

REMARKS

Upon entry of this Amendment, claims 1-3, 5-21, and 25-33 will be pending. In the Final Office Action dated February 25, 2008, pending claims 1-3, 5-21, and 25-32 were rejected under 35 U.S.C. 103 as being obvious over Collette (US 5,759,653) and/or Nilsson (US 5,034,252) in view of Collette.

I. New Claims

With this Amendment, new claim 33 has been added. Support for new claim 33 can be found, for example, at paragraph 56 of the published application.

II. Interview

Applicants are in receipt of the Interview Summary dated April 17, 2008. Applicant's Representative, Andrew DeMaster (Reg. No. 57,325), appreciates the Examiner's time in discussing the application on April 14, 2008.

In particular, the teachings of Collette were discussed with respect to activation of the oxygen-scavenging properties of the core scavenging layer of the multilayer Collette container, with Applicant's Representative asserting that Collette teaches activation of the scavenging layer prior to filling, unlike the instant claims. The proposed combination of Nilsson in view of Collette to yield a monolayer container was also briefly discussed, e.g., in relation to claim 31. Applicant's Representative asserted that a skilled artisan would not have been motivated to make the proposed combination.

No agreement was reached regarding the allowability of the pending claims. During the interview, Applicant's Representative was informed that the pending claims would be in condition for allowance if Applicants show that it would have been unobvious to:

- (i) activate the oxygen-scavenging properties of the Collette scavenging layer by filling the multilayer Collette container with product; and
- (ii) incorporate the Collette master-batch approach (without including PC-PET in the scavenging layer as taught by Collette) into Nilsson to yield

a monolayer container where the oxygen-scavenging material is activated after filling the container with product.

If Applicants have in any way misstated the Examiner's position, clarification is respectfully requested.

II. 35 U.S.C. 103

A. Collette

Claims 1-4, 6-15, 17-21, and 25-32 stand rejected under 35 U.S.C. 103(a) being obvious over Collette.

1. Independent Claim 1

(a) Collette does not teach activation prior to filling

Independent claim 1 recites a method for forming a container that is stable during unfilled storage and has a barrier layer with an oxygen scavenging property that is activated after filling the container with an aqueous fluid. In contrast, Collette teaches a multilayer container made from a material that is not storage stable, whereby the container has a scavenging layer that is activated prior to filling the container with product.¹ Moreover, Collette does not include any disclosure of a method for forming a container having a scavenging layer that is not activated prior to filling.

The Final Office Action persists in wrongly characterizing various passages of Collette as teaching activation of the Collette scavenger layer after filling. For the reasons already of record², Applicants reiterate that none of the cited passages disclose activation of the Collette scavenger layer after filling. As an example of the continued mischaracterization of the Collette teachings, the Final Office Action at page 10 wrongly asserts that "Collette discloses activation after filling by the fill material in the portion of the reference at 8:46-9:10." This passage, in fact, discloses the exact opposite – i.e., activation of the oxygen scavenging layer prior to filling. The EVOH shielding layers described in the cited passage are used to prevent oxygen from reaching the already-

¹ See, e.g., col. 6, lines 50-55; Summary at paragraph 4, sentence 2; Summary at paragraph 5, sentences 2-4; claim 19; and col. 8, lines 57-62.

² See, e.g., Applicants' Amendment dated September 17, 2007 at pages 10-11 and Applicants' Amendment dated February 21, 2007 at pages 10-11.

activated oxygen-scavenging layer during unfilled storage, thereby preventing depletion of the scavenging capacity of the activated scavenging layer prior to filling.³ Upon filling, the oxygen-barrier properties of the inner EVOH shielding layer decreases, thereby allowing oxygen entrapped in the filled container to permeate through the inner EVOH layer and reach the activated scavenging layer.⁴

At page 11, the Final Office Action also asserts an inherency argument regarding activation of the Collette scavenger layer. In particular, it is asserted that “by providing the same or substantially the same preblend process where a diluent polycster, a polyamide, and a catalyst are mixed (Collette, col. 5), it is the Examiner’s position that the method of Collette would provide the same degree of elimination of premature activation of the oxygen scavenging complex by also eliminating contact between the various constituents in substantially the same way.” Such an inherency argument has no basis because the Collette reference itself teaches that the oxygen-scavenging layer of the Collette container is activated prior to filling and, therefore, teaches that steps (e.g., refrigeration, dessication, storage under a modified atmosphere, and/or use of EVOH shielding layers) must be taken to avoid depletion of the activated scavenging layer prior to container filling. Thus, contrary to the assertions of page 11 of the Final Office Action, the burden has not shifted to Applicants to show an unobvious difference.

(b) Claim 1 is not an obvious reordering of the steps of Collette

The Final Office Action at page 3 also asserts that “[i]f it is ultimately determined that Collette activates before filling, this limitation is drawn merely to a rearrangement of process steps disclosed by the prior art, and in view of Collette’s teaching of methods in which the catalysts are activated, one would have found it obvious to rearrange the order of filling and activation.” The Final Office Action at page 11 further asserts that “the claimed invention is merely a rearrangement in the order of activation of the catalyst and that the ordinary artisan would have had all the necessary tools to perform this rearrangement.”

³ See, e.g., col. 8, lines 57-62.

⁴ See, e.g., col. 9, lines 2-8.

Applicants traverse the aforementioned obviousness rejection. Collette teaches a container made from a material that is not storage stable and is inherently activated prior to filling. Thus, claim 1 is not merely rearrangement of the process steps of Collette. Moreover, no explanation has been provided as to how a skilled artisan would have modified the Collette method to successfully produce a storage stable container having a barrier layer activated only after filling⁵, let alone why a skilled artisan would have been motivated to make any such modifications in the first place.

As discussed above, in the Interview it was asserted that the pending claims would be in condition for allowance if Applicants show that it would have been unobvious to activate the oxygen-scavenging properties of the Collette barrier layer by filling with product. It is submitted that this is an impermissible shifting onto Applicant of a burden belonging to the Patent Office. It is not Applicants' burden to make a showing of non-obviousness. Rather, it is the Patent Office's burden to make a showing of obviousness⁶ which, as articulated in the recent Supreme Court case of *KSR International Co. v. Teleflex Inc.*⁷, must be supported by a fact-based analysis that has been made explicit. With respect to claim 1, it is respectfully submitted such a burden has not been met and, moreover, cannot be met based on the teachings of Collette.

2. Independent Claim 27

Independent claim 27 recites a method for producing a plastic container having a barrier layer that is formed from an admixture that *consists essentially of* the preblend and a virgin bottle grade base polyester. Claim 27 stands rejected as being obvious in view of Collette. While the Final Office Action on page 6 concedes that "Collette does not explicitly teach (a) the admixture consists essentially of the preblend and virgin bottle grade polyester, or (b) the permeability change achieved by filling with water," it asserts

⁵ In general, the Final Office Action vastly oversimplifies the technical considerations of this complex and unpredictable technology area. It is improper to treat the chemistry of activation as a highly predictable process step that can be essentially initiated on demand – similar, e.g., to flipping a switch on a machine.

⁶ See, e.g., MPEP 2142 and 2143.

⁷ *KSR International Co. v. Teleflex Inc.*, 550 U.S. ___, 82 USPQ2d 1389 (2007).

that these features would have been *prima facie* obvious. Applicants respectfully traverse this assertion.

It is immaterial whether Collette teaches an admixture as recited in claim 27 since Collette teaches activation of the barrier layer before filling and does not disclose any method for forming a container having a barrier layer with an oxygen-scavenging property that is activated after filling. Because the Collette container is activated before filling, it would not exhibit the features of clause (f).

Moreover, contrary to the assertions of the Final Office Action, Collette does not disclose a barrier layer formed from an admixture that *consists essentially of* a preblend and a virgin bottle grade polyester. Rather, Collette teaches forming the scavenging layer from an admixture that contains the PC-PET in an amount effective to accelerate activation of the oxygen scavenger.⁸ As stated in the Collette prosecution history, “PC-PET material surprisingly acts to accelerate activation of . . . an oxygen scavenger. Surprisingly, Virgin PET, also a non-scavenging material, does not achieve the same acceleration effect.”⁹ Thus, the inclusion of PC-PET in an amount pursuant to the teachings of Collette would be expected to materially affect activation of the barrier layer.

For the foregoing reasons, Applicants respectfully submit that claims 27 and 28 (which depends from claim 27) are in condition for allowance.

3. Independent Claim 31

Independent claim 31 stands rejected as being obvious over Collette. Applicants respectfully traverse the Final Office Action’s assertion that, based on the teachings of Collette, it would have been *prima facie* obvious to produce a monolayer container as recited in claim 31. Whether Collette provides motivation to make a monolayer container (which it does not) is immaterial because any such monolayer container would already be activated before filling. Moreover, Collette teaches against making a monolayer container and, rather, teaches employing a multilayer design to protect food products

⁸ In particular, Collette teaches a scavenger layer formed from a blend that includes “on the order of 1-10% masterbatch, and 90-99% polymer, which includes at least on the order of 50% PC-PET.” See Summary at paragraph 4, sentence 4.

⁹ See the After-Final Request For Consideration dated October 28, 1997, emphasis in original.

from contacting contaminants or scavenging materials and byproducts present in the core scavenging layer.¹⁰

B. Nilsson in View of Collette

Claim 31 also stands rejected as being obvious over the combination of Nilsson in view of Collette. The Final Office Action asserts that Nilsson discloses all of the features of claim 31, but is silent to the preblend process of step (a) and mixing the preblend with the base polyester. The Final Office Action at page 9, however, asserts that it would have been obvious to one of ordinary skill in the art to incorporate the method of Collette into that of Nilsson to achieve improved mixing of the constituent materials. Applicants respectfully traverse this assertion.

Neither Collette nor Nilsson teach a method for making a container having a barrier layer with an oxygen-scavenging property that is activated after filling. Therefore, even if the proposed combination of Nilsson in view of Collette were to be made, the resulting monolayer container would still be activated before filling.

In the Interview, it was asserted that the pending claims would be in condition for allowance if Applicants show that it would have been unobvious to incorporate the Collette master-batch approach (without including PC-PET in the scavenging layer as taught by Collette) into Nilsson to yield a monolayer container where the oxygen-scavenging property of the container is activated after filling the container with product. For the same reasons as previously discussed, this too is an impermissible shifting of a burden belonging to the Patent Office. The burden is on the Patent Office to show that the proposed combination would have been obvious to a skilled artisan considering Nilsson and Collette.

It is respectfully submitted that the burden to show obviousness has not been met and, moreover, for the reasons that follow, cannot be met. First, Nilsson teaches that highly improved oxygen barrier properties can be achieved if the material in the Nilsson preform or container is allowed to undergo an aging process prior to container filling.¹¹

¹⁰ See, e.g., Summary at paragraph 3, sentences 1 and 3; and Summary at paragraph 4, sentence 1; col. 8, lines 26-28; col. 9, lines 37-38; col. 9, lines 49-50; col. 10, lines 20-22; and claim 1.

¹¹ See, e.g., Nilsson at col. 3, lines 14-23 and col. 6, lines 12-19.

As for Collette, it teaches both (i) to include an amount of PC-PET in the scavenging layer sufficient to achieve accelerated activation of the scavenging layer prior to container filling and (ii) to position an inner layer between the core scavenging layer and the filled product to protect the filled product from contact with the oxygen scavengers, its byproducts, or PC-PET contaminants. In order to make the combination proposed in the Interview, all of the aforementioned teachings would need to be ignored. Applicants submit that a skilled artisan would not be motivated to ignore each of these fundamental teachings to make the proposed combination. To conclude otherwise would be to exercise impermissible hindsight.

Thus, Applicants respectfully submit that claims 31 and 32 (which depends from claim 31) are in condition for allowance.

CONCLUSION

In view of the foregoing, claims 1-3, 5-21, and 25-33 are in condition for allowance. Reconsideration and prompt allowance of all pending claims is respectfully requested. The Commissioner is authorized to charge any additional fees associated with this paper or credit any overpayment to Deposit Account No. 50-2070.

Respectfully submitted,

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